72-625

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-625

MARGUERITE ANDRUS SMITH,
Petitioner,

versus

FALCON SEABOARD, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

MARGUERITE ANDRUS SMITH,
Petitioner,

versus

FALCON SEABOARD, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 12, 1972.

CITATION TO OPINIONS BELOW

The opinion of the Western District Court of Louisiana dismissing petitioner's case is printed in Appendix II hereto, and is not reported.

The opinion of the Court of Appeals, affirming the District Court holding is printed in Appendix III and is not yet reported.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix III, was entered on June 12, 1972. A petition for rehearing en banc was denied on July 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

THE QUESTIONS PRESENTED

Is equal protection of the law denied to workers injured or dependents of workers killed, in oil and gas operations beyond the three-mile limit off the coast of Louisiana, by application of the Outer Continental Shelf Act (43 U.S.C. Section 1331) and the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Sections 901, 903) in tandem so as to create an unreasonable classification based on the movability of the platform upon which the work is performed?

Are these workers or their dependents being deprived of their property without due process of law by the above application of statutes?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The Constitutional provisions involved are the equal protection clause of the Fourteenth Amendment. (*U.S. Const.* Amend. XIV, Sec. 1) and the due process clause of the Fifth and Fourteenth Amendments, (U.S. Consti. Amend. XIV, Sec. 1; *U.S. Const.* Amend. V). The text of these amendments is found in Appendix V. The state-

utes involved are 43 U.S.C. Section 1333 (the Outer Continental Shelf Lands Act), and 33 U.S.C. 903 (The Longshoremen's and Harbor Workers' Compensation Act). Since the text of the statutes is somewhat lengthy, it is printed in Appendix I.

STATEMENT OF THE CASE

Arthur Smith, husband of Marguerite Andrus Smith and father of three children, was a roughneck-derrickman employed by Falcon Seaboard, Inc. Smith was engaged in the dismantling of the rig No. 61 in the Gulf of Mexico, when, as he was attempting to loosen a clamp in the derrick (approximately 100 feet off the platform), he lost his balance when the small platform he was on suddenly shifted, and fell 80 feet to his death.

Petitioner, widow of Arthur Smith, sued her husband's employer in Federal Court (jurisdiction being based on diversity of citizenship along with damages in excess of $10,000.00 and the fact that the suit was in admiralty) for damages caused by the employer's negligence and the unseaworthiness (or "Unjobworthiness") of the facilities on which her husband was killed in the course of his employment in oil and gas operations beyond the three-mile limit off the coast of Louisiana. Plaintiff conceded in her complaint that, since the drilling platform involved was stationary and fixed in place, and could not be moved unless dismantled, she was entitled only to the benefits provided by the Longshoremen's and Harbor Workers' Compensation Act, as extended to such claimants by the Outer

Continental Shelf Act. Plaintiff contends, however, that the statutes as applied in this case are unconstitutional, and moved unsuccessfully below for the convocation of a three-judge court to enjoin any single District Judge from dismissing her suit thereunder. Defendant employer then moved to dismiss plaintiff's suit under those statutes, and then motion was granted. Plaintiff appealed to the U. S. Court of Appeals for the fifth circuit, but the lower opinion was affirmed. A request for rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Court does not need, and appellant's counsel probably cannot give, a summary of the complex personal injury law of offshore oil and gas operations. But the complexity is essentially the problem, since the accident victim and his attorney (not to mention the employer and his), viewing this field of law from dormitory communities in adjacent states, can do so with nothing but bewilderment, despair, and a growing conviction that offshore personal injury law is needlessly arbitrary and grossly unfair to a very substantial segment of offshore workers. This case is a classic example:

The discounted value of the case is approximately $25,000.00 under the Longshoremen's and Harbor Worker's Compensation Act. If decedent had been killed doing the same work, with the same equipment, for the same employer, at the same place, on a platform years before or years later movable from its location without disassembly, the case would have a judicially

noticeable settlement value of approximately $100,000.-00. The ancient or ultimate movability of the platform would bring into play, instead of merely the Longshoremen's and Harbor Workers' Compensation Act, a veritable cornucopia of entirely different remedies—the Jones Act, the Maritime Wrongful Death Action, the right to indemnity for unseaworthiness (or unjobworthiness), the Death on the High Seas Act, possible maintenance and cure benefits assuming non-instantaneous death, and — functionally or practically — jury trial, comparative or proportionate fault, a judicial forum, full damages, and the prospect of securing vigorous representation of counsel under traditional contingent fee arrangements.

We respectfully submit that such vastly different possible outcomes of identical accidents, so dependent on the otherwise irrelevant mobility of the situs (unlike arbitrary or geographic differences enmeshed in sovereignty and federalism), indicate a gross violation of familiar constitutional principles of Equal Protection and Due Process. 16 Am. Jur.2d, Const. Law, Section 518, 524; 16A C.J.S., Const. Law, Sections 497, 498.

Aside from long-rumored Congressional concern that may eventually help, but much too late for many, when it ripens into remedial legislation, an escape from this offshore legal jungle is at hand. The Court has jurisdiction in this case to hold:

(1) That the Outer Continental Shelf Acts' extension of the Longshoremen's and Harbor Workers' Compensation Act, with the latter's exemption of crew members of a vessel from its coverage is unconstitutional; or

(2) That at least the exclusion of other remdies against the employer by the Longshoremen's and Harbor Workers' Compensation Act, so extended, is unconstitutional as applied to offshore oil and gas operations; or theoretically (not directly presented for decision here)

(3) That the exemption of crew members of a vessel from the Longshoremen's and Harbor Workers' Compensation Act, so extended is unconstitutional; and

(4) That the wthdrawal of the exclusive federal compensation remedy from offshore oil and gas operations, leaving those formerly compensation - covered operations subject to State law through the Outer Continental Shelf Act under the rationale of *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), would be equally and for the same reasons unconstitutional; and therefore,

(5) That admiralty has jurisdiction over all offshore personal injuries, saving to those

who fall under the Jones Act and the Death on the High Seas Act their supplemental remedies under those statutes.

It is for these results (excluding No. 3) that this case is presented to the Court. Besides the interest of the plaintiff to be served thereby, we respectfully submit that the interest of the Legal Order generally would be served, even if only to spur Congressional action toward a uniformity and simplicity perhaps more palatable to the industrial and workers' organizations involved.

In support of these simple contentions, we respectfully submit the following tables, perhaps not entirely accurate or lucid in every respect, but graphically suggesting the nature of the problem and its constitutional solution.

TABLE 1

CONCEPTUAL COMPARISON OF PRESENT AND SUGGESTED PERSONAL INJURY LAW SYSTEMS OFFSHORE

(V-Vessel Related) (Nv-Non-Vessel Related)

EMPLOYEE'S ELECTIBLE REMEDIES	*INJURY*				*DEATH*			
	Present		*Suggested*		*Present*		*Suggested*	
	V	*NV*	*V*	*NV*	*V*	*NV*	*V*	*NV*
Jones Act	X	O	X	O	X	O	X	O
Unseaworthiness	X	O	X	X[a]	X	O	X	X
Maritime Tort	X	O	X	X	X	O	X	X

Maintenance and Cure	X	O	X	X[2]				
LSHW Compensation	X[1]	X	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]
State Compensation	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]	X[1]
State Tort Action	X[1]	O	X[1]	X[1]	X[1]	O	X[1]	X[1]
Jones Death Action					X	O	X	O
Maritime Death Action								
Death on High Seas					X	O	X	X

[1]Probably electible as a purely practical matter.
[2]Under a king of "jobworthiness" extension.
[3]Questionable.

TABLE II

PRACTICAL COMPARISON OF PRESENT AND SUGGESTED PERSONAL INJURY LAW SYSTEMS OFFSHORE

(V-Vessel Related)
(Nv-Non-Vessel Related)

EMPLOYEE'S	*INJURY*				*DEATH*			
ELECTIBLE	*Present*		*Suggested*		*Present*		*Suggested*	
REMEDIES	*V*	*NV*	*V*	*NV*	*V*	*NV*	*V*	*NV*
Jury Trial	X	O	X	X[3]	X	O	X	X[3]
Comparative Fault	X	X[1]	X	X	X	X[1]	X	X

Full Damages	X	O	X	X	X	O	X	X
Judicial Forum[2]	X	O	X	X	X	O	X	X
Federal Forum	X	X	X	X	X	X	X	X
State Forum	X	O	X	X	X	O	X	X

[1]No Fault.
[2]Euphemism for "vigorous representation by counsel".
[3]"Saving to suitors" election.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted:

Tate and Tate
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Mamou, Louisiana 70554

Paul C. Tate

CERTIFICATE

I certify that a copy of the foregoing brief has been mailed, postage prepaid, to James E. Diaz, Esquire, attorney for appellee, 201 West Main Street, Lafayette, Louisiana, 70501; and to the Acting United States Attorney General, Washington, D.C.

Of Counsel

APPENDIX

I. Text Of Statutes Challenged - The Outer Continental Shelf Lands Act

43 U.S.C. Sec. 1333

> (c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. . .

The Longshoremen's and Harbor Workers' Compensation Act

33 U.S.C. Sec. 903

> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—
>
> (1)A master or member of a crew of any vessel, nor any person engaged by the

master to load or unload or repair any small vessel under eighteen tons net;

...

II. Judgment Of Dismissal Rendered By U. S. District Court

UNITED STATES DISTRICT COURT
For the
WESTERN DISTRICT OF LOUISIANA

MARGUERITE ANDRUS SMITH,
Plaintiff,
versus Civil Action No. 16,686

FALCON SEABOARD, INC.,
Defendant.

ORDER

Under the authority of *Thompson V. Crown Petroleum Corporation* (5 Cir. 1969 418 F.2d 239), LET the Motion to Dismiss filed herein on behalf of Falcon Seaboard Drilling Company, Inc., be and it is hereby SUSTAINED, and this action is to be dismissed at plaintiff's cost.

Alexandria, Louisiana, this 30th day of December, 1971.

/s/ Nauman S. Scott
United States District Judge

Filed
Jan. 3, 1972.

III. Opinion Of The Fifth Circuit Court Of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1365
Summary Calendar*

MARGUERITE ANDRUS SMITH,
Plaintiff-Appellant,

versus

FALCON SEABOARD, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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(June 12, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: Title 43, U.S.C. Section 1333 (b)[1] provides that:

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]A portion of the Outer Continental Shelf Lands Act, August 7, 1953, c. 345, 67 Stat. 462, Title 43, U.S.C., Secs. 1331-1343 inclusive.

"The United States District Courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the Outer Continental Shelf, proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose."

It is provided by Title 43, U.S.C., Section 1333(c), in relevant part that:

"With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) The term 'employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States

or any agency thereof or of any State or foreign government or of any political subdivision thereof, . . ."

In this appeal, the widow of a worker assigned to an offshore drilling platform in the Gulf of Mexico off the Coast of Louisiana challenges as unconstitutional the difference in treatment afforded, for purposes of compensation, to workers assigned to platforms and those assigned to vessels, by Section 1333(c). We find no constitutional informity to the reference statute and affirm the District Court's dismissal of the complaint.

On or about September 4, 1970, at night, Arthur Smith fell to his death from an oil and gas drilling rig mounted on an offshore drilling platform. His widow, the plaintiff-appellant, is receiving benefits under the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C., Sections 901 *et seq.* Mrs. Smith brought this action in admiralty and in law to recover full damages for the death of her husband alleging negligence of the decedent's employer and unseaworthiness of the drilling platform. At the motion of Falcon Seaboard, Inc., the defendant and employer of the decedent, the District Court dismissed the action because of the exclusivity of remedy provision of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C., Section 905.[2]

---

[2]Title 33, U.S.C., Sec. 905:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, . . ."

As she did in the District Court, Mrs. Smith argues here that Congress has created an unreasonable classification, in violation of the principles of equal protection of the laws, by specifying that employees assigned to stationary drilling platforms on the Outer Continental Shelf are limited to the recovery authorized by the Longshoremen's and Harbor Workers' Compensation Act while employees assigned to vessels may avail themselves of the more liberal features of the law of admiralty and what she refers to on brief as "a veritable cornucopia of entirely difference remedies — the Jones Act, the maritime wrongful death action, the right to indemnity for unseaworthiness (or unjobworthiness), the Death on the High Seas Act, possible maintenance and cure benefits assuming non-instantaneous death and — functionally or practically — jury trial, comparative or proportionate fault, a judicial forum, full damages, and the prospect of securing vigorous representation of counsel under traditional contingent fee arrangements." She asserts that the "mobility of the situs" is an irrelevant consideration in determining the means of extending compensation for personal injuries or death.

Phrased less legalistically, Mrs. Smith complains that had she been permitted access to remedies open to widows similarly situated except for the accident occurring on a vessel, she would have been entitled to a substantially larger recovery than the aggregate benefits under the Longshoremen's Act. The argument then is that the lower benefits under the Longshoremen's Act amount to an impermissibly dis-

criminatory classification in violation of the Fifth Amendment to the United States Constitution.

Mrs. Smith's contention overlooks several important aspects of the Longshoremen's Act: (1) she has been receiving benefits under the Longshoremen's Act from the commencement of her widowhood, while recovery by suit in admiralty and at law could well have been delayed for several years (2) the defenses available to the employer under the Longshoremen's Act are virtually non-existent when compared to the body of admiralty and related tort law; and (3) the Longshoremen's Act is administered by a highly specialized agency of the United States Gaoovernment, while the admiralty and related tort law is administered in more episodic fashion by courts of general jurisdiction.

Consideration of these factors leads us to conclude that the "mobility of the situs" is not an arbitrary criterion which renders the distinction drawn in Section 1333 (c) constitutionally defective. Mrs. Smith's complaint can more appropriately be dealt with in the halls of Congress, where the statutory distinction originated.

The judgment of the District Court is

AFFIRMED.

IV. Judgment of the Fifth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 72-1365
Summary Calendar

D. C. Docket No. 16686

MARGUERITE ANDRUS SMITH,
Plaintiff-Appellant,

versus

FALCON SEABOARD, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: Aug 1, 1972

June 12, 1972

V. Denial Of Rehearing By Fifth Circuit Court Of Appeals

IN THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 72-1365

MARGUERITE ANDRUS SMITH,
Plaintiff-Appellant,

versus

FALCON SEABOARD, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 12, 1972, 5 Cir., 1972 ____ F.2d ____)

(July 24, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 iFederal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is Denied.

VI. Text Of Constitutional Amendments Involved

U. S. Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

U. S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.